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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

JOHN F. THOMPSON, III,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were Petitioner's Sixth Amendment right to counsel of choice and his interest in continuity of counsel eviscerated when during a federal criminal proceeding the government moved pretrial to disqualify long standing defense counsel, the court never ruled on the motion, the court never conducted substantive hearings on the matter with the Petitioner present, and the court instead allowed counsel to withdraw without any inquiry into the circumstances of the change in representation, even though the court knew that the Petitioner did not consent to the substitution of counsel?

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PETITION FOR WRIT OF CERTIORARI

Petitioner John F. Thompson, III, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS AND RULINGS BELOW

The opinions and orders of the United States Court of Appeals for the Eleventh Circuit and the United States

District Court for the Northern District of Georgia do not appear as reported decisions. The Order dated October 31, 2008 of the United States Court of Appeals for the Eleventh Circuit denying Mr. Thompson's motion for reconsideration of the denial of a Certificate of Appealability is appended as Appendix A. The Order of the Court of Appeals dated September 12, 2008 denying Mr. Thompson's application for a Certificate of Appealability is appended as Appendix B. The Order of the District Court dated July 10, 2008 denying Mr. Thompson's application for Certificate of Appealability is appended as Appendix C. The District Court's Order dated May 18, 2007 denying Mr. Thompson habeas corpus relief on certain of his claims is appended as Appendix D. The District Court's Order dated April 18, 2008, denying Mr. Thompson relief on other claims and entering judgment against him is appended as Appendix E.

JURISDICTION

Following a jury trial, John F. Thompson was convicted of conspiracy to commit mail fraud, four counts of mail fraud, and nine counts of money laundering in the United States District Court for the Northern District of Georgia. The Court of Appeals affirmed his convictions on May 27, 2005, *United States v. Thompson*, 133 Fed. Appx. 652 (11th Cir. 2005), and on October 31, 2005, this Court denied *certiorari*. *Thompson v. United States*, 546 U.S. 979 (2005).

On October 30, 2006, Mr. Thompson moved to vacate his convictions and sentences pursuant to 28 U.S.C. § 2255 on the grounds that they were obtained in violation of the Constitution. On May 18, 2007, the District Court denied relief on some of Mr. Thompson's claims and ruled that an evidentiary hearing was necessary to resolve the balance of the petition. After conducting an evidentiary hearing, the District Court

denied relief and entered judgment against Mr. Thompson on April 18, 2008.

Mr. Thompson noted an appeal and sought a Certificate of Appealability in the District Court on June 13, 2008, to seek further review of some of the claims and questions presented in his petition. The District Court denied a Certificate with respect to any of the claims on July 10, 2008. Mr. Thompson then sought a Certificate of Appealability on specific claims in the Court of Appeals for the Eleventh Circuit. On September 12, 2008, a single judge acting on behalf of the Court of Appeals denied a Certificate on any of Mr. Thompson's claims. Mr. Thompson moved the Court of Appeals to reconsider the denial. On October 31, 2008, the Court of Appeals denied the motion for reconsideration.

On January 22, 2009, Justice Thomas granted Mr. Thompson an extension to and including February 28, 2009 to file this petition. A letter from the Clerk of the

Court informing the parties of the extension of time is appended as Appendix G. This petition, therefore, is timely filed in accord with Supreme Court Rule 13.3. Jurisdiction for this Court to consider Mr. Thompson's petition for writ of *certiorari* is therefore invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Petitioner John Thompson's life was immersed in the timber industry of Georgia. Tr. 1027-1031; Movant's Proffer In Support of Evidentiary Hearing at para. 23.G.[1]

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[1] "Tr. __" refers to the consecutively paginated transcript of the Record of Proceedings of the jury trial conducted by the District Court August 18-27, 2003. These proceedings are the predicate

Along with his father, he had grown up cutting and selling timber to area mills. Gradually, he owned his own timber tracts. He purchased timber rights from other land owners. He bought cut timber from other suppliers. *Id.* at para. 23.H.

From the mid-1980s through the 1990s, Petitioner's business had grown substantially. Tr.53, 199-200. He had acquired a "dealership" that carried with it a quota for timber sales to various mills. Tr. 83; Movant's Proffer

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for Petitioner's effort to obtain habeas corpus relief. Matters pertaining to the formation of an attorney-client relationship between Petitioner and his original attorney do not appear in the record of the trial proceedings. Record citations to pleadings are therefore necessary for a simple reason. Petitioner pled his Sixth Amendment counsel of choice claim with particularity. *See* Petitioner's Motion to Vacate, Set Aside or Correct Sentence By a Person In Federal Custody at III.A., para. 15-26. Petitioner also moved the District Court for an evidentiary hearing on the counsel of choice claim. *See* Petitioner's Motion to Vacate, Set Aside or Correct Sentence By a Person In Federal Custody, at IV.(4); Movant's Proffer In Support of Evidentiary Hearing at para. 1. However, the District Court ruled that a hearing was unnecessary and summarily denied relief on the counsel of choice claim. *See* May 18, 2007 Order, Appendix D. Accordingly, under *Blackledge v. Allison*, 431 U.S. 63, 82-83 (1977) and its progeny, the allegations should be treated as established.

In Support of Evidentiary Hearing at para. 23.H. These quotas, in turn, permitted Petitioner to contract with smaller dealers so that these third parties could deliver timber to mills and sell it under Petitioner's contract. *Id.* As a broker, Petitioner received commissions on the third party sales. Petitioner did business with ten to twelve mills located throughout middle and central Georgia. *Id.*

At any given time, Petitioner employed loggers, truckers, heavy equipment operators, and mechanics. Tr. 269. Petitioner permitted as many as ten suppliers to sell under his contracts. Tr. 279. He would receive a commission based on the timber the suppliers delivered to the mills. Petitioner's timber business was conducted out of an office staffed by three employees. Tr. 267-268. In addition to paying routine bills and fielding telephone calls, office staff took care of the payroll, scale tickets, settlement sheets, and compensation for insurance claims. Tr. 279. The office staff handled two hundred to three

hundred scale tickets per week. Tr. 473. As one of Petitioner's independent suppliers described the situation, Petitioner "wasn't ever hardly there. He was always out looking for more jobs and stuff like that." Section 2255 Hearing, August 27, 2007 at 15. Similarly, an office worker called by the government testified that Petitioner was anything but a hands-on office manager. Instead, Petitioner was "very lenient, just everything was loose ends, just - - I guess you say he put a lot of trust in his employees and just trusted us to do the right thing." Tr. 270.

Petitioner sold and brokered timber to a lumber mill in Barnesville, Georgia. Proctor and Gamble owned the Barnesville mill when Petitioner first began selling raw materials to the mill. Proctor and Gamble subsequently sold the mill to Weyerhaeuser. The Barnesville mill was a major contract for Thompson. Tr. 199-200, 394. As a result he, his employees, and his

contractors had regular contact with the Barnesville mill and its employees. Tr. 410, *passim*.

For most of the period that Petitioner, his employees, and his contractors dealt with the Barnesville mill, Annie Bailey was one of two scale operators the mill employed. Tr. 743-744. Her job was to oversee timber deliveries, log trucks in and out of the mill gate, and record the amount of raw materials each truck brought to the mill by weighing its load. Tr. 88-89.

In the fall of 1999 and spring of 2000, special agents with the Internal Revenue Service met with Petitioner twice at his office. Tr. 897-98, 916-17. The agents would subsequently testify that they told Petitioner that he was not the target of their investigation. Tr. 905. Instead, the agents were interested in the activities of the Barnesville mill scale operator (Annie Bailey) and an individual known as L.B. Howard. Tr. 900. Petitioner told the agents that Bailey

had approached him and asked whether a friend of hers named L.B. Howard could sell wood to the Barnesville mill under Petitioner's contract. Tr. 901-03, 919-23. At the end of the first meeting with the agents, Petitioner agreed to make available business records showing settlement sheets to the Barnesville mill from 1994 through 1998. Tr. 904-05. The agents served Petitioner with what they would later characterize as a "summons" for the materials. Tr. 904.

After the request for the production of business records, Petitioner met with his attorney, George C. Rosenzweig. Petitioner had never before been involved with a criminal investigation. Rosenzweig had been Petitioner's attorney since the 1970s, representing Petitioner on several zoning and business matters. Movant's Proffer In Support of Evidentiary Hearing at para. 4.C. Rosenzweig did both criminal and civil trial

work. Movant's Proffer In Support of Evidentiary Hearing at para. 4.A.

Petitioner's reasons for relying on Rosenzweig as his attorney were simple. Rosenzweig had worked extensively on various legal issues connected with the timber industry in Georgia. Movant's Proffer In Support of Evidentiary Hearing, at para. 4.B. These matters included litigation connected with the sale of timber and timber equipment, drafting and negotiating contracts for the purchase and sale of timber, and timber title work. As a result of his timber related legal work, Rosenzweig had developed ties to various individuals, consultants, and experts active in the timber industry. *Id.*

Most importantly, as events would later unfold, Petitioner had selected Rosenzweig to represent him in a civil suit totally unrelated to his timber interests. In the spring of 1993, Rosenzweig was lead counsel in *Jim Morgan. et al. v. Diane Dawson, et al.*, 3:93-cv-47, United

States District Court for the Northern District of Georgia, Newnan Division. The lawsuit was brought by nineteen plaintiffs, including Petitioner, against Coweta County, Georgia officials for defamation and constitutional torts. The litigation centered on release of a document that charged plaintiffs with being connected to substandard building practices, dubious home financing agreements, political corruption, and gambling. At no point did *Morgan v. Dawson* concern, involve, or reflect Petitioner's work in the timber industry. Movant's Proffer In Support of Evidentiary Hearing, at para. 4.D. and E.

Through the years, Petitioner had learned to trust, rely upon, and work productively with Rosenzweig. Movant's Proffer In Support of Evidentiary Hearing, at para. 4.C. Not surprisingly, therefore, after his visit from the special agents, Petitioner met with Rosenzweig to discuss the matter. Movant's Proffer In Support of Evidentiary Hearing, at para. 4.I. Indeed, it was

Rosenzweig who had handled the production of documents to show Petitioner's dealings with the Barnesville mill. *Id.* Later, the government informed Petitioner through Rosenzweig that Petitioner was a target of a grand jury investigation. At that point, based on Rosenzweig's previous representation of Petitioner and Rosenzweig's experience in timber related legal matters, Petitioner retained Rosenzweig to represent Petitioner in the criminal investigation and any subsequent proceedings. *Id.*

Notwithstanding his and his counsel's cooperation, Petitioner was indicted on fourteen counts of conspiracy, mail fraud, and money laundering, based upon events that occurred at the Barnesville mill from the late 1980s through 1997. Rosenzweig entered his appearance on behalf of Petitioner.

There is no question that Petitioner had substantial and sustained business dealings with the

Barnesville mill during that time period. There also is no question that he had regular contact with the mill's scale operators, including Bailey. There is no question that Petitioner appeared as the broker in the scale tickets that Bailey had created, which showed timber deliveries from L.B. Howard. The only issue is whether Petitioner's role was that of a knowing and deliberate conspirator in the scheme to defraud Proctor and Gamble and Weyerhaeuser of seven million dollars that the companies had paid for phantom timber loads that were never delivered, as the government maintained, Tr. 1004-05, or, if instead, Petitioner was an unknowing participant in Bailey's scheme, every bit as much of a victim as the mill owners.

Before this question could be resolved and Petitioner's culpability fairly determined, the government moved to disqualify Rosenzweig as Petitioner's counsel. Movant's Proffer In Support of Evidentiary Hearing at para. 4.N. According to the government, Rosenzweig had

represented one of the government's key witnesses in the criminal case against Petitioner in the earlier civil matter, *Morgan v. Dawson*.[2] The District Court conducted an in chambers conference on the government's motion to disqualify counsel. Petitioner was not present at

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[2] The witness was Sarah Elizabeth Collier. She was a former employee of Petitioner. Tr. 368. Collier did testify against Petitioner and proved to be a critical prosecution witness. Tr. 366-494. Her involvement with *Morgan v. Dawson*, however, was *de minimis*. Although originally a plaintiff, Collier was dropped from the litigation after suit was filed. Suit was filed June 9, 1993. On July 18, 1995, a consent order was entered dismissing Collier. *Jim Morgan, et al. v. Diane Dawson, et al.*, 3:93-cv-47, United States District Court for the Northern District of Georgia, Newnan Division, July 18, 1995 Order, Docket Entry 208; Movant's Proffer In Support of Evidentiary Hearing at 4.D. There was no substantive overlap between the subject matter of the lawsuit and that of the indictment, and the government did not contend to the contrary. Movant's Proffer In Support of Evidentiary Hearing at 4.E. and G. The pretextual character of the government's motion is clear. Indeed, it is ironic that the government would claim that Rosenzweig's loyalties were fatally divided based on a lawsuit that was factually unrelated, remote in time, and was based on Rosenzweig's simultaneous and joint representation of Collier and Petitioner. Any theoretical conflict of interest Collier may have had in Rosenzweig's representation of Petitioner was waived when she voluntarily and knowingly formed the joint attorney-client relationship with Rosenzweig and Petitioner in the civil suit. Petitioner's position concerning any theoretical conflict he may have suffered due to the dual representation was made clear, and waived, when through counsel he informed the District Court that he did not consent to any substitution of counsel. *See* Letter from George C. Rosenzweig to Ms. Vicki Hanna, Courtroom Deputy, Chief Judge Orinda D. Evans, dated March 28, 2003, attached as Appendix F.

the proceeding. Movant's Proffer In Support of Evidentiary Hearing at para. 4.O.

Based on the in chambers conference, Rosenzweig believed that the government was going to do anything necessary to remove him from the case. Movant's Proffer In Support of Evidentiary Hearing at para. 4.P. Rosenzweig also believed that any effort to persuade the District Court otherwise, through law or facts, would be futile. *Id.* As a consequence, Rosenzweig did not compel the government to show through evidence that there was a factual basis that required his disqualification, and no evidentiary hearing was ever held on the motion to disqualify Rosenzweig. *Id.*

Rather than take the steps necessary to perfect and protect Petitioner's right to counsel of choice, Rosenzweig filed a motion to withdraw. Movant's Proffer In Support of Evidentiary Hearing at para. 4.R. At the time he filed the motion, Rosenzweig also sent the District Court,

through its calendar clerk, a letter stating "[a]s I told you, Mr. Thompson will not consent to the Withdrawal." *Id.*, Correspondence from George C. Rosenzweig, Esq. to Ms. Vicki Hanna, Courtroom Deputy, Chief Judge Orinda D. Evans, March 28, 2003, appended as Appendix F.

Notwithstanding the letter's unequivocal assertion that Petitioner did not consent to his counsel's withdrawal, at no point did the District Court conduct any hearing on the status of counsel or Petitioner's right to counsel, counsel of choice, and his interest in continuity of counsel. Instead, a motion to substitute counsel was filed and granted, and two new attorneys entered appearances on Petitioner's behalf. Movant's Proffer In Support of Evidentiary Hearing, at para. 4.S.

No further hearings were conducted on the question of counsel. At no point did the court inquire of Petitioner about the issue of representation or what his original counsel meant when he informed the District

Court that Petitioner objected to any change in counsel. At no point did successor counsel speak with Petitioner about his interest in continuity of counsel. Nor was the question of Petitioner's counsel of choice raised further on the record.

Petitioner was tried. The jury convicted him on all counts in the indictment. Petitioner was sentenced to concurrent terms of incarceration of sixty months on the conspiracy conviction and seventy months on all other convictions. Petitioner also was ordered to pay restitution in the amounts of $2,471,777.09 to Weyerhaeuser and $893,964.92 to Proctor and Gamble.

Petitioner's convictions were affirmed on direct appeal. *United States v. Thompson*, 133 Fed. Appx. 652 (11th Cir. 2005). Certiorari was denied. *Thompson v. United States*, 546 U.S. 979 (2005). He then sought relief pursuant to 28 U.S.C. § 2255. In his petition, Petitioner challenged the constitutionality of his convictions and

sentence on three separate grounds: violation of his Sixth Amendment right to counsel of choice; violation of his Sixth Amendment right to the effective assistance of counsel based on the prejudicial impact of trial counsel's deficient acts and omissions; and violation of his Sixth Amendment right to have a jury determine the facts necessary to imposition of the terms of restitution. *See* Petitioner's Motion to Vacate, Set Aside or Correct Sentence By a Person In Federal Custody at III.A., para. 15-26; III.B., para. 27-36; III.C., para. 37-40.

Petitioner sought an evidentiary hearing on each of the claims presented in his petition, including the counsel of choice issue. *Id.* at IV.(4); Movant's Proffer In Support of Evidentiary Hearing at para. 1. The District Court, however, denied a hearing with respect to the counsel of choice claim and permitted factual development only on the ineffectiveness matters. May 18, 2007 Order attached as Appendix D. After conducting the evidentiary hearing,

the District Court denied relief on all of Petitioner's claims and entered judgment against him. April 18, 2008 Order attached as Appendix E. The District Court then denied a Certificate of Appealability with respect to any of the claims and issues Petitioner raised, including the choice of counsel claim. July 10, 2008 Order attached as Appendix C. The Court of Appeals also denied a Certificate of Appealability with respect to the counsel of choice and other claims. September 12, 2008 Order, attached as Appendix B. The Court of Appeals then denied Petitioner's motion for reconsideration. October 31, 2008 Order, attached as Appendix A.

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court Should Determine the Full Scope of the Right to Counsel of Choice and a Criminal Defendant's Interest in the Continuity of Representation

This Court should grant *certiorari* to determine what procedures are necessary before a criminal defendant's right to counsel of choice may be lost. Here,

the District Court approached the relinquishment of the right, and the loss of a criminal defendant's interest in the continuity of counsel, in a cursory fashion. The absence of any on the record proceedings and safeguards with regard to the question of representation is incommensurate with this Court's definition of the right to counsel of choice, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-148 (2006), *Wheat v. United States*, 486 U.S. 153, 159 (1988), and the procedural protections associated with the exercise of the right to counsel and other trial rights. *Johnson v. Zerbst*, 304 U.S. 458 (1938) (loss of the right to counsel determined by "knowing and intelligent" waiver standard); *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (exercise of right to proceed *pro se* conditioned upon "searching or formal" judicial inquiry); *Boykin v. Alabama*, 395 U.S. 238 (1969) (waiver of rights to be free of self-incrimination, to challenge the prosecution's case, and to present a defense cannot be inferred from a silent record). It also conflicts

with the clearly established precedent of other circuits. *United States v. Treadway*, 328 F.3d 878 (6th Cir. 2003).

A. The cursory treatment the District Court afforded to Petitioner's choice of counsel -- with respect to both the government's motion to disqualify defense counsel and counsel's ultimate withdrawal -- violated Petitioner's Sixth Amendment right to the counsel of his choice

It is well recognized that the Sixth Amendment right to counsel includes the right to counsel of choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-148 (2006); *Wheat v. United States*, 486 U.S. 153, 159 (1988); *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981). Counsel of choice is regarded as part of the "root meaning" of the Sixth Amendment. *United States v. Gonzalez-Lopez*, 548 U.S. at 147. It is also viewed as functioning as a "cornerstone" of adversary process. *Linton v. Perini*, 656 F.2d at 209, 212. The right is traced to the very patriarch of the constitutional right to counsel cases. "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to

secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

The reasons why the right to counsel of choice is afforded such recognition are clear. A defendant's interest in continuity of counsel in a criminal proceeding is paramount. *See* Anne Bowen Poulin, "Strengthening the Criminal Defendant's Right to Counsel," 28 Cardozo L. Rev. 1213, 1249-1259 (December 2006). This is so both because of what defense counsel represents and his functional role in the adversary process. "[S]election of an attorney demark[s] the sphere of defense strategies a defendant will have presented to him . . . For once a lawyer has been selected law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." *Faretta v. California*, 422 U.S. 806, 820 (1975) (quotation omitted). As noted by the American Bar Association:

> The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

American Bar Association, Standards Relating to the Administration of Criminal Justice, the Defense Function, (1971), Section 5.2(b).

As this Court has held, "[t]he right to defend is personal." *Faretta v. California*, 422 U.S. at 834. While the right to counsel under the Sixth Amendment "does not include the right to a meaningful attorney-client relationship," *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (quotation omitted), "to assist the defendant . . . effectively the attorney must work closely with the defendant in formulating defense strategy." Id., at 21 (Brennan, J., concurring). Consequently, as courts have observed:

> [T]he most important decision a defendant makes in shaping his defense is the selection of an attorney. The selected attorney is the mechanism through which the defendant will learn of the options which are available to him. It is from his attorney that he will learn of the particulars of the indictment brought against him, of the infirmities of the government's case and of the range of alternative approaches to oppose or even cooperate with the government's efforts.

United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979). *Accord Linton v. Perini*, 656 F.2d at 209 ("The right to choose one's own counsel is an essential component of the Sixth Amendment because, were a defendant not provided the opportunity to select his own counsel . . . the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut.") Given the place and role of a defendant's chosen counsel, one lower court has reasoned that "if a defendant chooses a particular counsel, the sixth amendment prevents a court from taking any arbitrary action prohibiting the effective use of (a particular) counsel." *Carey v. Rundle*, 409 F.2d

1210, 1215 (3d Cir. 1969) (parenthetical in original) (quotation omitted).

However important the right to counsel of choice, like most rights, it is subject to qualification. This Court has held that an individual's selection of counsel is trumped by the "showing" of an "actual" or "serious potential" conflict of interest. *Wheat v. United States*, 486 U.S. at 164. An individual's inability to retain the attorney he wishes to represent him, even where that inability stems in part from government action, does not vitiate the right. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989) (operation of forfeiture statutes to impair defendant's ability to pay attorney fees does not violate Sixth Amendment by limiting his choice of counsel). The right is qualified where the chosen lawyer is not admitted to practice in the jurisdiction where the prosecution takes place. *Wheat v. United States*, 486 U.S. at 159. So, too, does an attorney's

demonstrated and repeated "disregard for governing ethical principles." *United States v. Collins*, 920 F.2d 619, 631-634 (10th Cir. 1990). A court's legitimate interest in controlling scheduling and overseeing its docket may take precedence over a defendant's choice of counsel. *United States v. Whitehead*, 487 F.3d 1068, 1071 (8th Cir. 2007); *United States v. Baucom*, 486 F.3d 822, 827 (4th Cir. 2007).

None of the qualifying or limiting factors recognized in *Wheat* and the cases implementing the right to counsel of choice materialized to determine who actually represented Petitioner in the case at bar. Based on his training, experience, practice, and prior representation of Petitioner, the attorney Petitioner originally retained was certainly qualified to serve as counsel. Nor did the government allege that counsel of choice's representation was compromised by the

demonstration of an "actual" or "serious potential" conflict as in *Wheat*. 486 U.S. at 164.

Indeed, in *Wheat* the defendant was represented by counsel. He sought to have substitute counsel enter an appearance. The district court, and ultimately this Court, determined that based on the record there was a serious potential conflict. This was because substitute counsel, who the defendant wanted to represent him, was simultaneously representing a codefendant in the same case, and the government maintained that the codefendant was a material witness against Wheat. *Wheat v. United States*, 486 U.S. at 156.

In the case at bar, the government did not allege, much less demonstrate, the type of conflict this Court reasoned was necessary to overcome the "presumption in favor of . . . counsel of choice." *Wheat v. United States*, 486 U.S. at 164. The fact that counsel of choice, Petitioner, and a government witness had had a joint

attorney-client relationship a decade earlier in a civil lawsuit that was wholly unrelated to the subject matter of the criminal prosecution comes nowhere near the type of divided loyalties deemed sufficient to rebut the *Wheat* presumption.[3] For example, where the law partner of counsel of choice represented a government witness who pled guilty to offenses arising out of the same transactions as the subject matter of the defendant's indictment, the potential conflict was sufficiently serious to preclude the lawyer from serving as counsel. *United States v. Campbell*, 491 F.3d 1306, 1312 (11th Cir. 2007). Similarly, where counsel of choice would result in the

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[3] The law is settled. To determine if prior representation gives rise to the risk of divided loyalties so as to constitute a potential conflict disqualifying counsel, a court must consider the subject matter of the first representation and determine that it is "substantially related" factually to the second. *United States v. Ross*, 33 F.3d 1507, 1523 (11th Cir. 1994), *relying on*, *United States v. James*, 708 F.2d 40, 46 (2d Cir. 1983). Where there is a substantial relation between the two, then the court must determine if there is a risk that effective representation in the second will result in the improper use of privileged materials or if the prior representation could inhibit effective cross-examination in the second. *Id.*, *relying on*, *United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991). *Accord*, *United States v. Campbell*, 491 F.3d 1306, 1311 (11th Cir. 2007).

simultaneous representation of multiple defendants by a single attorney, and there are identifiable and antagonistic defenses between the defendants, the presumption is rebutted. *Serra v. Michigan Department of Corrections*, 4 F.3d 1348, 1351 (6th Cir. 1993). Where there is a showing that counsel may be called as a witness in a prosecution arising out of his representation of the defendant, or that the lawyer may even be the target of a grand jury investigation himself, the risk of divided loyalties is sufficiently real to disqualify counsel. *United States v. Jones*, 381 F.3d 114, 118, 120 (2d Cir. 2004). *See also*, *United States v. Merlino*, 349 F.3d 144, 150, 152 (3d Cir. 2003) (where counsel of choice through his own conduct in attempting to influence a prosecution witness made himself a possible witness, counsel was disqualified); *United States v. Combs*, 222 F.3d 353, 357-358, 361 (7th Cir. 2000) (where court conducts inquiry during trial and makes findings that defense counsel

interviewed government witness, arranged for attorney to represent the witness, and saw to it that the attorney was paid, there is "manifest necessity" for mistrial and counsel of choice is disqualified from further proceedings).

Even though a *prima facie* ground to disqualify Petitioner's counsel of choice was never set forth, his counsel of choice did not represent Petitioner at trial. Substitute counsel instead conducted the trial that led to Petitioner's convictions. The substitution of counsel took place solely because the District Court failed to inquire into the reasons for counsel's withdrawal and Petitioner's position with respect to the change in representation. Instead of directly inquiring of counsel or his client about the circumstances of counsel's withdrawal, the District Court conducted an in chambers conference, without Petitioner being present, and then subsequently granted Rosenzweig's motion to withdraw without requiring any showing or offering Petitioner an opportunity to respond.

B. The District Court's failure to conduct substantive hearings on the issue of representation and continuity of counsel with Petitioner present is at odds with how this Court has implemented the right to counsel in other contexts

This Court has recognized that a criminal defendant's interest in continuity of counsel and his right to counsel of choice is weighty enough that its violation is deemed structural error. *United States v. Gonzalez-Lopez*, 548 U.S. at 150. As such, a violation of the right is one of the pristine rights not subject to harmless error analysis. *Id.* The District Court's treatment of matters implicating Petitioner's exercise of his right to counsel of choice is totally at odds with the rule of *Gonzalez-Lopez*. The District Court's casual and vapid response to the question of representation is also contrary to the safeguards this Court has demanded concerning the implementation of analogous rights. Most importantly, courts have long recognized that the exercise of the right to counsel itself is protected by the most stringent standard of waiver.

Johnson v. Zerbst, 304 U.S. 458 (1938) (failure to assert right to counsel must be "knowing and intelligent"). Similarly, where a defendant elects to forego counsel and represent himself under *Faretta v. California*, 422 U.S. 806 (1975), that election is subject to a "searching or formal" judicial inquiry. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). Indeed, once formal proceedings have come into play, the waiver of any constitutional right ought not be inferred from a silent record. *Parke v. Raley*, 506 U.S. 20 (1992); *Boykin v. Alabama*, 395 U.S. 238 (1969).

C. Where the District Court knows that Petitioner objects to any change in representation, the District Court is duty bound to follow the rule of other circuits and hold a substantive hearing with Petitioner present before granting any motion that results in the substitution of counsel

Precedent in other circuits holds that the kind of process afforded Petitioner undermines constitutional rights. *United States v. Treadway*, 328 F.3d 878 (6th Cir. 2003), parallels the case at bar in many ways. In

Treadway, the government moved to disqualify retained counsel. As here, the court never ruled upon the motion. Instead, counsel moved to withdraw. 328 F.3d at 881-882. As here, the court granted the motion to withdraw and permitted the substitution of counsel without conducting any hearing concerning the defendant's representation by counsel. 328 F.3d at 881-882, 887. Neither successor counsel nor the defendant objected to the summary manner in which counsel was substituted. The defendant then pled guilty but challenged the court's failure to conduct a hearing on the motion to withdraw on direct appeal.

While ultimately denying relief,[4] the Court of Appeals for the Sixth Circuit held that the district court's summary treatment of the question of representation was

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[4] *Treadway* was decided before *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The defendant's convictions were affirmed in *Treadway* notwithstanding the violation of the defendant's right to counsel of choice because the appellate court determined that the error was not prejudicial. 328 F.3d at 888. Such reasoning does not survive *United States v. Gonzalez-Lopez*.

plain error. 328 F.3d at 881, 887-888. According to the appellate court, "the district court committed error that was plain by failing to provide Treadway an opportunity to be heard before allowing his chosen counsel to withdraw." 328 F.3d at 881. The appellate court unequivocally held that "a criminal defendant should have notice and an opportunity to be heard when his attorney of choice seeks to withdraw from representation." 328 F.3d at 887-888.

Here, Petitioner was never afforded the simple safeguard *Treadway* requires. Unlike the defendant in *Treadway*, however, Petitioner made his objection to the change in counsel known to the District Court when his counsel's letter accompanying the motion to withdraw flatly asserted, "[a]s I told you, Mr. Thompson will not consent to the Withdrawal." Correspondence from George C. Rosenzweig, Esq. to Ms. Vicki Hanna, Courtroom Deputy, Chief Judge Orinda D. Evans, March 28, 2003,

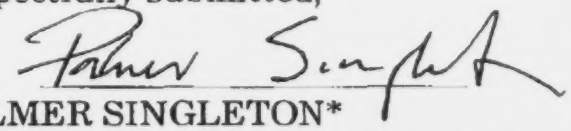
appended as Appendix F. Because of the District Court's failure to conduct any hearing, or even conduct an on the record inquiry of Petitioner, Petitioner's right to counsel of choice was erroneously sacrificed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court issue a writ of *certiorari* to determine the full scope of the right to counsel of choice and how it is to be implemented and protected, and to review the denial of relief under 28 U.S.C. § 2255.

Dated: This 27th day of February, 2009.

Respectfully submitted,

BY: 

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Counsel for John F. Thompson, III
*Counsel of Record

No. 08A630
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2008

JOHN F. THOMPSON, III,
Petitioner,
-vs-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDICES

APPENDIX A: United States Court of Appeals for the Eleventh Circuit, October 31, 2008 Order denying Petitioner's motion for reconsideration of the denial of a Certificate of Appealability

APPENDIX B: United States Court of Appeals for the Eleventh Circuit, September 12, 2008 Order denying Petitioner's application for a Certificate of Appealability

APPENDIX C: United States District Court for the Northern District of Georgia, July 10, 2008 Order denying Petitioner's application for Certificate of Appealability

APPENDIX D: United States District Court for the Northern District of Georgia, May 18, 2007 Order denying Petitioner habeas corpus relief on certain of his claims

APPENDIX E: United States District Court for the Northern District of Georgia, April 18, 2008 Order denying Petitioner relief on other claims and entering judgment against him

APPENDIX F: Correspondence from George C. Rosenzweig, Esq. to Ms. Vicki Hanna, Courtroom Deputy, Chief Judge Orinda D. Evans, March 28, 2003

APPENDIX G: Correspondence from Clerk of the Supreme Court of the United States notifying Petitioner that Circuit Justice Granted an extension of time in which to file the petition for writ of *certiorari*

APPENDIX H: United States Constitution, Amendment VI

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 31 2008
THOMAS K. KAHN
CLERK

No. 08-13452-F

JOHN F. THOMPSON, III,

Petitioner- Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

Before: CARNES and WILSON, Circuit Judges.

BY THE COURT:

Appellant has filed a motion to reconsider this Court's order dated September 12, 2008, denying his

motion for a certificate of appealability. Because appellant has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, this motion for reconsideration is DENIED. See Fed.R.App.P. 40(a)(2).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 12 2008
THOMAS K. KAHN
CLERK

No. 08-13452-F

JOHN F. THOMPSON, III,

Petitioner- Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable

both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Since appellant has failed to satisfy Slack's test, his motion for a certificate of appealability is DENIED.

/s/ Ed Carnes

UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CHAMBERS
U.S.D.C. – Atlanta
JUL 10 2008
JAMES N. HATTEN,
Clerk
By: /s/
Deputy Clerk

UNITED STATES OF AMERICA	:	CRIMINAL CASE NO. 1:02-cr-706-ODE
v.	:	
JOHN F. THOMPSON, III	:	CIVIL ACTION NO. 1:06-cr-2636-ODE

ORDER

This criminal case and related habeas corpus petition is before the Court on John F. Thompson, III's ("Thompson's") motion for a certificate of appealability ("COA") [Doc. #157]. Thompson seeks a COA with respect to the Court's Orders dated May 18, 2007, [Doc. #134] and April 18, 2008, [Doc. #154] as well as "from the order and judgment denying him relief under 28 U.S.C. § 2255 entered on April 18, 2008." [Doc. #157, at 1].

An appeal may not be taken from a final order in a habeas case unless "a circuit justice or judge issues a certificate of appealability.... " 28 U.S.C. § 2253 (c) (1). Such a certificate may issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U. S. C. § 2253(c)(2). In Slack v. McDaniel, 529 U.S. 473 (2000), the Supreme Court discussed this requirement. It noted that:

> To obtain a [certificate of appealability] under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under Barefoot, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

Slack, 529 U. S. at 483-84 (citing Barefoot v. Estelle, 463 U. S. 880 (1983)) (internal quotations omitted). The Court has carefully reviewed Thompson's motion and finds that he has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordingly, Thompson's motion for a certificate of appealability is DENIED. [Doc. #157].

SO ORDERED, this 10 day of July, 2008.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CHAMBERS
U.S.D.C. – Atlanta
MAY 18 2007
JAMES N. HATTEN,
Clerk
By: /s/_____
Deputy Clerk

JOHN F. THOMPSON, III, Movant,	:	MOTION TO VACATE 28 U.S.C. § 2255
V.	:	CRIMINAL NO. 1 :02-CR-706-ODE
UNITED STATES OF AMERICA, Respondent.	:	CIVIL ACTION NO. 1:06-CV-2636-ODE

ORDER

I. Introduction

Movant John F. Thompson, III, has filed the instant motion to vacate his sentence pursuant to 28 U.S.C. § 2255. [Doc. 117]. The Government and Movant have filed their various responsive pleadings. [Docs. 123, 128, and 131]. On January 5, 2007, in response to Movant's request for an evidentiary hearing, this Court

ordered Movant to demonstrate why a hearing is necessary by identifying each issue from the § 2255 motion that requires a hearing, identifying each witness who would testify regarding that issue, and providing what the testimony would be. [Doc. 125]. Movant responded with a very ably-prepared and detailed proffer of the proposed testimony that he would like to present. [Doc. 132].

This matter is now before the Court for (1) a partial consideration of the § 2255 motion on the merits, (2) a determination of that a hearing is necessary, and (3) a ruling regarding what testimony will be permitted at the hearing.

II. Procedural History

On August 28, 2003, after a seven day jury trial, Movant was convicted in this Court for one count of conspiracy to commit mail fraud, four counts of mail fraud, and nine counts of money laundering. [Doc. 56]. On February 4, 2004, this Court sentenced Movant to a sixty-month term of incarceration for the single conspiracy count and to thirteen terms of seventy months of incarceration on each of the remaining counts, with all sentences to run concurrently. [Doc. 69].

Movant appealed, and on May 25, 2005, the Eleventh Circuit affirmed Movant's convictions and sentences. United States v. Thompson, 133 Fed. Appx. 652 (11th Cir. 2005). Thompson petitioned the Supreme Court of the United States for a writ of certiorari. The Supreme Court denied Thompson's petition on October 31, 2005. John F. Thompson III v. United States, 126 S. Ct. 598 (No. 05-435, Oct. 31, 2005).

Briefly describing the facts presented at Movant's trial, Movant owned several businesses involved in the timber industry. Movant and Ann Bailey ("Bailey"), a scale house operator at a timber mill, together defrauded the timber mill by creating false documentation for deliveries of timber that did not exist. The timber mill then paid Movant for deliveries of timber that the timber mill had never received, and, after deducting a percentage, Movant sent the remaining money to Bailey.

III. Discussion of Movant's Claims for Relief

Ground A: Movant's Claim that he was Denied his Attorney of Choice

When Movant was first indicted, he retained George C. Rosenzweig

("Rosenzweig") to represent him. On February 28, 2003, the government filed a motion to disqualify Rosenzweig because of a conflict of interest. [Doc. 21]. This Court held an in-chambers conference on the motion on March 13, 2003, which Rosenzweig attended but Movant did not attend. At the hearing, the parties revealed that Rosenzweig had previously represented two witnesses that the Government planned to present to testify against Movant.[1] Rosenzweig contended that his prior representations of the two witnesses were in civil matters that had been minor and wholly unrelated to the facts of the criminal proceedings. The government disagreed, contending that funds related to Movant's fraud scheme had also been involved in one of the civil actions in which

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[1] Sarah Elizabeth Collier had already testified before the grand jury that indicted Movant, and Collier had entered into an agreement to testify - and ultimately did testify - for the government at Movant's trial. Rosenzweig had represented Collier in a civil action in which claims of defamation, invasion of privacy, and racketeering were ultimately litigated in both federal and state court. Collier withdrew from the litigation prior to its conclusion, and her role in the litigation appears to have been minor. The other potential witness was identified as "Individual B," and the record is not entirely clear as to Rosenzweig's involvement with this witness. [See generally, transcript of March 13, 2003, in chambers conference].

Rosenzweig had represented one of the government's witnesses.

This Court never issued an order granting the government's motion to disqualify Rosenzweig. However, on April 2, 2003, Rosenzweig filed a motion to withdraw as Movant's attorney, [Doc. 27], and on April 9, 2003, Rosenzweig filed a motion to substitute counsel, [Doc. 28], which motion this Court granted that same day, [Doc. 29]. Attorneys Andrew John Ekonomou and Michael George Lambros then entered appearances on Movant's behalf.

Movant contends that, "[a]t no time was the government required to establish an evidentiary predicate for attorney Rosenzweig's disqualification. Additionally, at no time was evidence submitted to establish that attorney Rosenzweig's prior representation of Collier was unrelated as a matter of law to Mr. Thompson's current representation." [Doc. 117 at 8]. Moreover, according to Movant, because of Rosenzweig's knowledge of the timber industry and his experience in litigating timber-related matters, "but for the absence of attorney Rosenzweig's advocacy, the discharge of the defense function and the outcome of the proceedings would have been different." [Id. at 9]. Movant contends that his Sixth Amendment right to defense counsel of his own choice as described in

United States v. Gonzalez-Lopez, 126 S.Ct. 2557 (2006) and Wheat v. United States, 486 U.S. 153 (1988) was violated when his attorney was "forced" to withdraw.

As an initial matter, this Court agrees with the Government that this claim is procedurally defaulted. Lynn v. United States, 365 F.3d 1225, 1234 (11th Cir. 2004) ("Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding."). Where a § 2255 movant fails to raise an available claim on appeal, he must demonstrate both cause for the default and actual prejudice resulting from the violation in order to lift the procedural bar. Reed v. Farley, 512 U.S. 339, 354 (1994); see Wainwright v. Sykes, 433 U.S. 72, 84 (1977) (discussing cause and prejudice standard).

Movant did not raise this claim in his appeal, but he raises a claim of ineffective assistance of trial counsel as cause for the default. However, Movant's trial counsel did not represent him on appeal, and he has not raised a claim of ineffective assistance of appellate counsel. Accordingly, Movant has not demonstrated cause for his failure to raise this claim in his appeal.

As to his assertion that this claim is akin to a claim of ineffective assistance of counsel, which is not subject to the procedural default rule, see Massaro v. United States, 538 U.S. 500, 504 (2003), this Court disagrees. Generally, a *successful*[2] claim of ineffective assistance of counsel necessarily requires evidentiary development, most notably to overcome the presumption that trial counsel's actions were not supported by a reasonable strategy and to demonstrate that the error was prejudicial. Id. at 501; see generally Strickland v. Washington, 466 U.S. 668 (1984). The need for further evidentiary development renders direct appellate review of ineffective assistance claims impossible without a remand to a trial court which is equipped to receive evidence, and the Supreme Court in Massaro determined that it would be a more efficient use of judicial resources to defer review of ineffective assistance claims until § 2255 proceedings commence. In contrast to an ineffective assistance claim, the facts relating to Rosenzweig's withdrawal were known at the time of the appeal, and a transcript of the in-chambers

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[2] This Court stresses that only a *successful* claim of ineffective assistance counsel claim requires a hearing. As will be demonstrated below, many unsuccessful claims of ineffective assistance can be disposed of without a hearing.

conference relating to the matter was in the record. Accordingly, despite Movant's contention to the contrary, no further evidentiary development of this claim is necessary, and the notions of judicial efficiency that motivated the Supreme Court in Massaro do not here apply. This Court thus concludes that Movant's claim that he was denied his attorney of choice is procedurally defaulted.

This Court further notes that Movant's Sixth Amendment right to his counsel of choice as described in Wheat and Gonzalez-Lopez was not violated. In Gonzalez-Lopez,

> the sole legal issue before the Supreme Court was what level of trial prejudice - if any - needed to be shown once it was determined that an erroneous deprivation of one's counsel had occurred. In order for the automatic rule of Gonzalez-Lopez to apply, in other words, it must first be shown that the trial court "wrongly" or "erroneously" denied the defendant his choice of counsel.

United States v. Zangwill, 197 Fed. Appx. 888, 891 n.1 (11th Cir. 2006) (citations omitted); see also United States v. Mendoza-Salgado, 964 F.2d 993, 1016 (10th Cir. 1992) ("Only when the trial court *unreasonably or arbitrarily interferes* with a defendant's right to counsel of choice do

we agree a conviction cannot stand, . . .") (emphasis in original).

This Court did not deny Movant his choice of counsel. Rather Rosenzweig withdrew from the representation without this Court's entering of an order on the Government's motion to disqualify him. A review of the case law on this point indicates that the right to choose one's own attorney is violated only when the trial court affirmatively acts to prevent a criminal defendant from so choosing. See Gonzalez-Lopez, 126 S. Ct. at 2557 (trial court refused to allow representation by attorney based on improper reading of local rule); Chandler v. Fretag, 348 U.S. 3, 10 (1954) (trial court refused criminal defendant an opportunity to secure counsel upon finding out that he would be tried on additional charges that he had not previously known about); Powell v. Alabama, 287 U.S. 45, 53 (1932) (trial court did not give the criminal defendants an opportunity to contact family to secure legal counsel). In one of the few reported cases that this Court could unearth in which an attorney withdrew, United States v. Treadway, 328 F.3d 878 (6th Cir. 2003), the Sixth Circuit held that, where an attorney withdrew from the representation of the criminal defendant because of a "potential" conflict of interest, the district "acted

appropriately" in allowing the withdrawal. Id. at 887 ("If the case had proceeded to trial, [the attorney] would have been unable to effectively cross-examine one of the government's key witnesses against Treadway due to his prior representation of the witness in an unrelated case.") ; see also United States v. Dansker, 537 F.2d 40, 64 (2d Cir. 1976) (noting that "the voluntary withdrawal of counsel prevented [the criminal defendant's] sixth amendment claim [of denial of counsel of choice] from ever materializing in the district court").

In Movant's proffer, [Doc. 132], Movant indicates that Rosenzweig would testify that "Rosenzweig believed that the government was going to do anything it needed to do to remove him from the case and that any effort to persuade the Court otherwise, through law or facts, would be futile." [Id. at 7]. Rosenzweig therefore withdrew as Movant's counsel. To the degree that Movant argues that Rosenzweig's removal was a *fait accompli* against which argument would be futile, the fact remains that Rosenzweig did not stick around to argue the issue, and this Court did not disqualify him. Movant cannot challenge a decree that this Court might have issued, regardless of how inevitable that decree might have been.

Movant also argues that Rosenzweig was constitutionally ineffective for withdrawing without more vigorously challenging his disqualification, a novel assertion as it implies that Movant would have preferred the representation of the "ineffective" Rosenzweig. However, counsel ineffectiveness cannot give rise to a claim of a denial of counsel of choice. "[A]s Gonzalez-Lopez makes clear, while the right to counsel of choice and the right to effective assistance of counsel are both found in the Sixth Amendment, they are distinct rights." United States v. Williams, Case No. 06-4215, 2007 WL 1157421, at *1 (4th Cir. 2007). As is noted above, a violation of the right to one's choice of counsel requires court action, and an attorney who withdraws from a representation cannot be said to have violated his former client's right to a counsel of choice by withdrawing. An attorney may withdraw from a representation, or refuse to represent a criminal defendant, for any number of reasons, and the fact that a criminal defendant cannot convince an attorney to represent him does not mean that his Sixth Amendment right to choose his attorney has been violated. Further, the question of whether Movant was prejudiced by Rosenzweig's absence is subsumed by by Movant's claim that trial attorneys Ekonomou and

Lambros were ineffective in failing to do the things that Rosenzweig would have done had he remained as Movant's attorney, which claim will receive careful review by this Court.

In conclusion, this Court concludes that Movant's Sixth Amendment right to his counsel of choice was not violated, and Movant is not entitled to relief on his Ground A.

Ground B: Ineffective Assistance of Counsel: Trial Counsel's Failure to Investigate, Counter the Government's Case, and Present Evidence of a Lack of Intent

Movant next claims that his trial attorneys failed to fully investigate the case, failed to counter evidence presented by the Government, and failed to present exculpatory evidence. This Court finds that the record regarding this claim is insufficiently developed and that a hearing must be held. The evidence that Movant will be permitted to present at that hearing is discussed below.

Ground C: Ineffective Assistance of Counsel: Trial Counsel's Failure to Challenge Certain Findings at Movant's Sentencing

In his final ground for relief, Movant claims that his trial counsel failed to challenge this Court's finding, made at Movant's sentencing hearing, that Movant owed $2,471,771.09 and $893,964.92 in restitution payments because the jury did not find beyond a reasonable doubt that Movant owed such sums. Movant relies upon the holdings in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), in which the Supreme Court held, generally, that facts other than a prior conviction used to enhance a sentence must be either admitted by the criminal defendant or determined by a jury beyond a reasonable doubt. See also United States v. Booker, 543 U.S. 220 (2005) (applying Apprendi and Blakely v. Washington, 542 U.S. 296 (2004), to the federal sentencing guidelines). Movant argues that, at the time of his sentencing, "the building blocks and tools were available to demand in accord with the Sixth Amendment that a jury find any fact necessary to the imposition of sentence." [Doc. 117 at 27].

However, "restitution orders do not violate the rule announced in Apprendi . . because the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663, does not have a prescribed statutory maximum." United States v. Williams, 445 F.3d 1302, 1310 (11th Cir. 2006) (citing

Dohrmann v. United States, 442 F.3d 1279 (11th Cir. 2006)).[3] Moreover, an order of restitution is not a criminal penalty such that the Sixth Amendment would apply. Rather a restitution order is a civil remedy which can be imposed by a judge under a preponderance of the evidence standard without running afoul of Apprendi and its progeny. United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000) (cited with approval by the Eleventh Circuit in Dohrmann, 442 F.3d at 1280).

Accordingly, Movant is not entitled to relief on his Ground C.

IV. Evidentiary Hearing

As is noted above, this Court has determined that an evidentiary hearing is necessary for consideration of Petitioner's Ground B. In his proffer, [Doc. 132], Movant

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[3] With regard to Movant's assertion that Dohrmann is inapposite because that case "deals with the jurisdictional predicate to 28 U.S.C. § 2241, not § 2255," [Doc. 128 at 25], this Court responds that (1) Dohrmann's holding regarding restitution orders not being subject to Apprendi was not limited to claims brought pursuant to § 2241 and (2) in Williams, cited above, the Eleventh Circuit reiterated its holding in Dohrmann in the context of a criminal appeal. Clearly, the rule announced in Dohrmann applies in this context.

proposes to present the testimony of thirteen witnesses in support of his Ground B. Having reviewed the proffer, this Court concludes that the testimony of most of those proposed witnesses is not necessary. This Court will receive the testimony of Charles Knox, George McGee, Michael G. Lambros, and Andrew J. Ekonomou.

This Court finds that there is no need to permit the remaining proposed witnesses to testify. Subject to the possible objection of the Government, this Court is willing to find that if those remaining witnesses were to testify, their testimony would reflect what is set forth in the Movant's proffer.

V. Conclusion

Accordingly, for the reasons set forth above,

IT IS HEREBY ORDERED that relief on Movant's Grounds A and C, as discussed above, is **DENIED**.

IT IS FURTHER ORDERED that a hearing in this matter is scheduled for Friday, June 22, 2006 at 11:00 a.m. in Courtroom 1908 of the Richard B. Russell Federal Courthouse in Atlanta, Georgia. The hearing testimony will be limited to matters related to Movant's Ground B, and only Charles Knox, George McGee,

Michael G. Lambros, and Andrew J. Ekonomou will be permitted to testify.

IT IS SO ORDERED this 18 day of May, 2007.

/s/ Orinda D. Evans

ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN F. THOMPSON, III,	:	CRIMINAL NO.
	:	1:02-cr-706-ODE
Movant,	:	
vs.	:	CIVIL ACTION FILE
UNITED STATES OF	:	NO. 1:06-cv-2636-ODE
AMERICA,	:	
Respondent.	:	

JUDGMENT

The Court having denied the motion filed pursuant to Title 28, United States Code, Section 2255,

Judgment is hereby entered in favor of the Respondent and against the Movant.

Dated at Atlanta, Georgia this 18th day of April, 2008.

JAMES N. HATTEN
CLERK OF COURT

By: s/Frances M. McNulty
Deputy Clerk

Filed: April 18, 2008
Entered:
In the Clerk's Office
James N. Hatten
Clerk of Court

By: s/Frances M. McNulty
Deputy Clerk

APPENDIX F

ROSENZWEIG, JONES & MACNABB, P.C.
ATTORNEYS AT LAW
32 SOUTH COURT SQUARE
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George C. Rosenzweig

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March 28, 2003

Ms. Vicki Hanna
Courtroom Deputy
Chief Judge Orinda D. Evans
1988 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30303

RE: United State of America v. John F. Thompson, III
Criminal Action No. 1:02-CR-706-ODE

Dear Ms. Hanna:

As we discussed during our telephone conversation this afternoon, you will find attached my Notice of Intention to Withdraw as Mr. Thompson's attorney. As I told you, Mr. Thompson will not consent to the Withdrawal. As I told you, Mr. Thompson met this afternoon with Andrew J. Ekonomou who I believe will be

entering an appearance, next week, on Mr. Thompson's behalf. Per your suggestion, we probably will be able to file a Notice of Substitution of Counsel next week. However, after our conversation finished, I have been unable to reach Mr. Ekonomou in order to specifically discuss that procedure.

If you would like to discuss this matter with me, I will be in the office until 5:00 p.m. this afternoon and I will be available at your convenience next week.

Sincerely,
/s/ George C. Rosenzweig
George C. Rosenzweig

GCR/nkw
Enclosure
c: Ms. PhyllisB. Sumner by Facsimile Transmission and First Class Mail
Mr. Andrew J. Ekonomou by Facsimile Transmission and First Class Mail
Mr. John F. Thompson, III

APPENDIX G

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of Court
(202)479-3011

January 22, 2009

Mr. Michael Kennedy McIntyre
965 Virginia Avenue, NE
Atlanta, GA 30306

Re: John F. Thompson, III
v. United States
Application No. 08A630

Dear Mr. McIntyre:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on January 22, 2009 extended the time to and including February 28, 2009.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter
By /s/Heather Trant
Heather Trant
Case Analyst

APPENDIX H

AMENDMENT VI[1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.